Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-1836

GREGORY K. LEWIN
PETITIONER,

VS.

STATE OF NEW JERSEY,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. _____

GREGORY K. LEWIN, Petitioner

v.

STATE OF NEW JERSEY, Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Petitioner prays that a writ of certiorari issue to review the judgement of the Superior Court of New Jersey, Appellate Division which was made and entered in the above cause, on November 15, 1978.

OPINION BELOW

The opinion of the Superior Court of New Jersey, Appellate Division is reported at 163 N.J. Super 441 (App. Div. 1978), 395 A. 2d 212. Said opinion appears in the Appendix hereto.

After a timely petition, certification by the Supreme Court of New Jersey was denied on April 10, 1979 without

opinion. Said denial of certification is reported at ___N.J.___(1979),___A.2d ___, and appears in the Appendix hereto.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3).

QUESTION PRESENTED

Whether the Supreme Court intended that the rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution must be implemented with the Miranda rules in motor vehicle offenses where there is a potentiality of incarceration.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves certain provisions of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, as well as certain New Jersey state statutory provisions.

A. THE FIFTH AMENDMENT TO THE CONSTITUTION

In pertinent part, the Fifth Amendment provides:

No person...shall be compelled in any criminal case to be a witness against himself.

B. THE SIXTH AMENDMENT TO THE CONSTITUTION

In pertinent part, the Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right...to the Assistance of Counsel for his defense.

C. THE FOURTEENTH AMENDMENT TO THE CONSTITUTION

In pertinent part, the Fourteenth Amendment provides:

....No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

D. THE RELEVANT NEW JERSEY STATUTES

N.J.S.A. 2A: 113-9

Death by heedless and careless operation of an automobile

Any person who causes the death of another by driving a vehicle carelessly and heedlessly, in willful or wanton disregard of the rights or safety of others, is guilty of a misdemeanor.....

N.J.S.A. 2A: 85-7

Misdemeanors; punishment

Any person found guilty of a crime which by any statute is declared to be a misdemeanor, and for which no

punishment is specifically provided, shall be punished by a fine of not more than $1,000 or by imprisonment for not more than 3 years, or both.

N.J.S.A. 39: 4-50

Operating under influence of liquor; penalty

A person who operates a motor vehicle while under the influence of intoxicating liquor...shall be subject, for the first offense, to a fine...or imprisonment for a term of not less than 30 days no more than 3 months or both, in the discretion of the magistrate...(F)or a subsequent violation, he shall be imprisoned for a term of 3 months.

N.J.S.A. 2A: 158A-5.2

Offenses and violations; legal representation

The Public Defender shall...provide for the legal representation of any person charged with a disorderly persons offense or with the violation of any law, ordinance or regulation of a penal nature where there is a liklihood that the persons so charged, if convicted will be subject to imprisonment or, in the opinion of the court, any other consequence of magnitude.

(Irrelevant portions of the foregoing New Jersey statutes have been omitted.)

STATEMENT OF THE CASE

Petitioner was charged by way of indictment with death by heedless and careless operation of an automobile pursuant to N.J.S.A. 2A: 113-9. On January 11, 1978 a jury returned a guilty verdict and shortly thereafter the petitioner was sentenced to a one (1) year term in the county jail of which five (5) months were suspended.

The indictment resulted from an accident whereby the petitioner's automobile struck two pedestrians. One of the victims died a few hours later at the hospital. At the scene, shortly after the accident and prior to the death, the petitioner was arrested for operating a motor vehicle while under the influence of liquor in violation of N.J.S.A. 39: 4-50. He was transported to police headquarters where he was questioned at length about the accident and his drinking that night. This round of questioning was not preceeded by Miranda warnings. During this interrogation the victim had not yet died.

The petitioner was questioned a second time at headquarters that same night. The police tape recorded these questions

and answers and gave the Miranda warnings prior to taping. The victim was still alive at the beginning of this second interrogation.

At the trial of the death by auto indictment, a motion to suppress the statements was denied. The answers the petitioner gave in response to the first interrogation (without the benefit of Miranda warnings) differed materially with the answers the petitioner gave on tape. Both statements were introduced on the state's case.

The trial court ruled that Miranda warnings were not required despite the "in-custody" interrogation of the petitioner and despite the potentiality of his incarceration of the charges for which he was originally arrested as well as the charges for which he was ultimately indicted and tried.

REASON FOR GRANTING THE WRIT

I.

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER STATE AND FEDERAL COURTS ON AN ISSUE WHICH CONTINUES TO CAUSE CONTROVERSY AND LITIGATION.

The specific issue raised in this petition is whether the warnings prescribed in Miranda v. Arizona, 384 U.S. 436 (1964) are mandated in connection with a motor vehicle violation, the conviction of which carries a potentiality of incarceration.

The facts of the case at bar bring to light the Constitutional difficulties created by the New Jersey Supreme Court's ruling in State v. Macuk, 57 N.J. 1, 268 A 2d 1 (1970), wherein that court held; "(We) are of the opinion...the rules of Miranda should be held inapplicable to all motor vehicle violations." 57 N.J. at 15-16, 268 A. 2d at 9. This mandate was followed by the Superior Court of New Jersey, Appellate Division in the instant case when it held that statements elicited from the petitioner, while in custody at police headquarters, were admissible

on the state's case. State v. Lewin, 163 N.J. Super 441 (Appellate Division 1978), 395 A. 2d 212. The petitioner initially had been arrested for driving a vehicle under the influence of liquor pursuant to N.J.S.A. 39: 4-50.

The introduction of the petitioner's "in-custody" statement occurred during his trial on an indictment charging him with causing death by heedless and careless operation of an automobile pursuant to N.J.S.A. 2A: 113-9. The Court in the instant case held:

> "Here, of course, the statements were offered and admitted into evidence in the prosecution of a criminal offense arising out of the accident. This circumstance, however, affects neither the validity nor the admissibility into evidence of the statements. If, in the context of the circumstances attendant upon the making of the statements, the statements are valid and admissible, without Miranda warnings, in a prosecution of the charge as to which they were taken, they retain their valid character and equally admissible in a subsequent prosecution of a criminal offense." Id., 163 N.J. Super at 441, 395 A. 2d at 213.

The question presented in this petition has been litigated in many state jurisdictions as well as in the federal courts and there is a split of authority in those jurisdictions.

Several state and federal courts have held that not withstanding "in-custody" interrogation, Miranda warnings are not required with respect to motor vehicle violations: State cases - State v. Neal, Mo., 476 S.W. 2d 547 (1972); County of Dade v. Callahon, 259 So. 2d 504 (Fla. 1971); State v. Macuk, supra; State v. Pyle, 19 Ohio St. 2d 64, 249 N.E. 2d 826 (1969), cert. den. 396 U.S. 1007 (1970); State v. Bliss, Del. 238 A. 2d 848 (1968); Federal cases - Clay v. Riddle, 541 F. 2d 456 (4 cir. 1976).

Other state and federal decisions have held that Miranda warnings are necessary prior to any "in-custody" questioning of persons arrested for motor vehicle offenses:

State cases - State v. Lawson, 285 N.C. 320, 204 S.E. 2d 843 (1974); State v. Darnell, 8 Wash. App. 627, 508 P. 2d 613, cert. den., 414 U.S. 1112 (1973);

Campbell v. Superior Court, 106 Ariz. 542, 479 P. 2d 685, (1971); Commonwealth v. Bonser, 215 Pa. Super 452, 258 A. 2d 675 (Super. Court 1969) People v. Phinney,22 N.Y. 2d 288, 292 N.Y.S. 2d 632, 239 N.E. 2d 515 (1968);

Federal Cases - U.S. v. Le Quire, 424 F. 2d 341, 343-344 (5th Cir. 1970); U.S. v. Chadwick, 415 F. 2d 167, 173 (10th Cir. 1969); Lowe v. U.S., 407 F. 2d 1391, 1394 (9th Cir. 1969); Allen v. U.S., 129 U.S. App. D.C. 61, 390 F. 2d 476, 478-79 (1968).

In some of the opinions holding Miranda not applicable to motor vehicle violations, the courts have commented on the absence of guidelines. In Bliss, supra, the Court noted:

> "Up to the present, the Supreme Court of the United States has not laid down a specific division line between those cases in which Miranda applies and those in which it does not...Until the Supreme Court furnishes further guidelines, we will not apply it to motor vehicle violations." 238 A. 2d at 850.

In Macuk, supra, the court said:

> "Now, with the problem squarely before us, we are of the opinion that, in view of the absence of any indications to the contrary by the United States Supreme Court, the rules of Miranda should be held inapplicable to all motor vehicle violations." 57 N.J. at 15-16, 268 A. 2d at 9.

It should be noted that none of the authorities cited that stand for or against the proposition that Miranda applies to motor vehicle violations ruled on the question under the law or constitutional authority of that state. All of the opinions refer to the Fifth or Sixth Amendments to the Federal Constitution or to the Miranda rights involved. Thus the disparity between rulings can not be explained away as legitimate interpretations by state courts of their respective state laws.

Since this issue arises from time to time in both the state and federal jurisdictions, it would be helpful if this Court would put the issue to rest by accepting review of this case.

II.

THE COURT BELOW ERRED IN ITS RULING THAT THE MIRANDA WARNINGS DID NOT APPLY TO AN "IN-CUSTODY" INTERROGATION OF A DEFENDANT CHARGED WITH A MOTOR VEHICLE OFFENSE WHICH CARRIED WITH IT THE POTENTIALITY OF INCARCERATION.

The Supreme Court of the United States has refused to apply some provisions of the Bill of Rights to the state courts, such as the right to a jury trial, in so-called petty offenses, which it has defined "as those punishable by no more than six months in prison and a $500 fine." Duncan v. Louisiana 391 U.S. 145, 161 (1968). On the other hand, the Court's opinion in Argersinger v. Hamlin, 407 U.S. 25 at 37 (1972), held that the Constitutional right to counsel attached to any offense, whether classified as petty, misdemeanor or felony, for which one may be imprisoned.

The opinion in Argersinger, supra, historically distinguished the right to a trial by jury from the right of assistance of counsel. The Court drew upon its decision in Powell v. Alabama, 287 U.S. 45 at 60 whereby it held:

> "While there is historical support for limiting the 'deep committment' to trial by jury to 'serious criminal cases' there is no such support for the similar limitation on the right of assistance counsel." Argersinger, supra at 30.

In the case at bar, the petitioner requests the court to consider whether the warnings required by Miranda should be limited to "serious criminal cases" or whether there is no such support for a limitation on those warnings.

The Supreme Court of New Jersey, in a decision that predated Argersinger, supra, recognized the right of all persons to representation by counsel where there existed the potentiality of consequenses of magnitude or imprisonment:

> "...But as a matter of simple justice, no indigent defendant should be subjected to a conviction entailing imprisonment in fact or other consequence of magnitude without first having had due and fair opportunity to have counsel assigned without cost." Rodriguez v. Rosenblatt, et al. 58 N.J. 281 at 295 (1971).

The New Jersey Legislature codified the decision in Rosenblatt, supra, requiring the assignment of counsel to indigent defendants "where there is a liklihood that the persons so charged, if convicted will be subject to imprisonment or, in the opinion of the court, any

other consequence of magnitude" N.J.S.A. 2A: 158A-5.2. This statute was in effect at the time of the petitioners arrest.

The petitioner contends that the warnings set out in Miranda are required in any offense, whether classified as petty, misdemeanor or felony, for which one may be imprisoned. Miranda contains rules of procedure which were created to protect an accused against infringement of the constitutional privilege agaist self incrimination. The Court, in formulating the Miranda warnings partially based their decision on the Sixth Amendment right to counsel:

> "...(T)he right to have counsel present at the interrogation is indispensible to the protection of the Fifth Amendment privilege under the system we delineate today." Miranda, supra, at 466.

Under New Jersey case law (Rodriguez, supra), and federal constitutional law (Argersinger, supra), there exists the right to counsel in any offense that carries the potentiality for incarceration. It is inconsistant with the policies underlying those decisions to require on one hand, that the right to assistance of counsel be protected with respect to a defendant charged with an imprisonable

offense while on the other hand with respect to that same imprisonable offense, to permit the police not to advise the accused of his Miranda rights, which include the right to have the assistance of counsel.

The potentiality of incarceration rather than whether a state labels an offense a felony, misdemeanor or motor vehicle violation should be the test of whether Miranda applies. In the instant case, the petitioner was arrested for driving under the influence of intoxicating liquor, the conviction of which carried a maximum penalty of 3 months under N.J.S.A. 39: 4-50. For a second offense under this statute the 3 month sentence was mandatory. Despite the potentiality of incarceration, New Jersey labels such an offense a motor vehicle violation or a "petty offense". Macuk, supra, at 9. Simply because New Jersey happened to label the petitioner's offense a petty one did not mean his conviction would not entail a deprivation of liberty.

The requirement of warnings based upon the manner in which a state labels a certain offense would be too mechanical

to serve the substantial interest of protection of fundamental liberties articulated in Miranda and would result in inconsistency among the states due to the varying definitions of these terms. Requiring Miranda warnings for any offense for which the loss of liberty is a possible sanction would resolve the long standing problem of the applicability of Mirnada to nonfelonies.

CONCLUSION

For the foregoing reasons, petitioner prays that a Writ of Certiorari issues to review the judgment rendered by the Superior Court of New Jersey, Appellate Division in this case.

Respectfully submitted,

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Appendix A

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2407-77

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

GREGORY K. LEWIN,

Defendant-Appellant.

Submitted October 30, 1978--
Decided November 15, 1978 Before
Judges Allcorn and Botter.
On appeal from Superior Court of
New Jersey, Law Division, Ocean
County.
Julio M. Fuentes, attorney for the
appellant.
John J. Degnan, Attorney General,
attorney for the respondent
(Susan W. Sciacca, Deputy Attorney
General, of counsel and on the
brief).
The opinion of the court was de-
livered by

ALLCORN, P.J.A.D.

The defendant appeals his conviction of the offense of causing death by careless and needless operation of an automobile in violation of N.J.S.A. 2A:

113-9, entered upon a jury verdict.

Defendant was arrested for driving a vehicle while under the influence of intoxicating liquor, following an accident in which defendant's vehicle struck two pedestrians. During the police investigation at the scene and at police headquarters and before defendant was given any Miranda warnings, defendant made certain statements to the police concerning the circumstances surrounding the occurrence of the accident, including his consumption of alcohol prior to the accident. Subsequent to the making of said statements, one of the pedestrians died as a result of the injuries he suffered and, thereafter, defendant was charged with the present criminal offense. At the criminal trial, defendant's statements were admitted into evidence by the trial judge. The defendant contends that the statements were not admissible because they were not preceded by a notice or warning of his rights.

In essence, the defendant urges that the statements should not have been admitted against him, since to do so was in violation of his rights as laid down in Miranda v. Arizona, 384 U.S. 436 (1966).

The law in New Jersey is plain that Miranda warnings need not be given to a person arrested for or charged with a violation of the motor vehicle laws such as drunken driving, before investigatory questioning of him. State v. Macuk, 57 N.J. 1 (1970). In short, "the rules of Miranda should be held inapplicable to all motor vehicle violations," Macuk, supra, page 16, and statements obtained from the defendant are admissible against him in prosecutions for such motor vehicle violations.

Here, of course, the statements were offered and admitted into evidence in the prosecution of a criminal offense arising out of the accident. This circumstance, however, affects neither the validity nor the admissibility into evidence of the statements. If, in the context of the circumstances attendant upon the making of the statements, the statements are valid and admissible, without Miranda warnings, in a prosecution of the charge as to which they were taken, they retain their valid character and are equally admissible in a subsequent prosecution of a criminal offense. As well stated in Clay v. Riddle, 541 F. 2d 456

(4 Cir. 1976), in addressing a very similar situation (at page 459):

> * * * (S)ince the challenged statement arose in the environs of the unlawful highway operation of an automobile, its stature is rated on that measure. Those circumstances mold its character permanently. Where lifted out of the milieu of its origin, obviously the initial character as a declaration in a traffic case is retained.

Accord, People v. Tate, 45 Ill 2d 540,259 N.E. 2d 791 (1970), cert. den. 401 U.S. 941 (1971).

Defendant also contends that his sentence was excessive. The contention is clearly without merit. R. 2:11-3(e) (2).

Affirmed.

APPENDIX B

SUPREME COURT OF NEW JERSEY
C-573 SEPTEMBER TERM 1978

STATE OF NEW JERSEY, Plaintiff-Respondent, v. GREGORY K. LEWIN, Defendant-Petitioner,	:	ON PETITION FOR CERTIFICATION

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same ,

It is hereupon ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 10th day of April, 1979.